SEPARATE STATEMENT OF COMM. HAROLD W. FURCHTGOTT-ROTH

In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act

I am pleased to support this Notice of Proposed Rulemaking. It puts us on the right track toward meeting our obligation under section 202(h) to assess the continued necessity of our ownership rules in light of competitive developments since their adoption and, if they are indeed unnecessary, to eliminate or modify them.

As an initial matter, I express my agreement with the separate statement of my colleague Commissioner Powell. Like him, and for the reasons he gives, I believe that a reevaluation of our traditional regulatory goal of "diversity" is a critical part of this biennial review. As he observes, this sometimes amorphously-defined goal and the assumptions upon which it rests must be clearly articulated and supported by facts, not conjecture, in order to withstand judicial review. Below, I set forth the additional questions that I see as relevant to our section 202(h) inquiry.

First Amendment As An Affirmative Basis for Ownership Rules

I would like to make clear my belief that the First Amendment is no source of affirmative authority to regulate mass media ownership, as parts of this item might be construed to suggest. For the time being, I would simply note that a quick refresher on the text of the First Amendment should be enough to establish that proposition: "Congress shall make no law . . . abridging the freedom of speech," U.S. Const., Amdt. 1. Phrased entirely in the negative, this provision is by its terms a *limitation on* -- not an *expansion of* -- governmental power.

Analysis Under Section 202(h)

Although today's item does not spell out what it means to assess whether a regulation is "necessary in the public interest as the result of competition," as the statute requires, it seems to me that in analyzing that issue it would be useful for commenting parties to consider: (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in the relevant market at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) and, finally, how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule.

Such considerations are directly related to the language of the statute, which clearly indicates that Congress wanted the Commission to consider the very real possibility that competitive forces have eliminated or decreased the need for ownership regulation and that our rules should keep pace, as near as possible, with the times.

Spectrum Scarcity

The congressional goal embodied in section 202(h) of eliminating anachronistic regulation, described above, brings me to my next topic. Many, if not most, of the rules under review in this proceeding are based upon a theory well known to those in the communications world: the "spectrum scarcity" rationale. I believe the Commission is obliged to review the factual underpinnings of this fifty-five year-old rationale to see whether they hold true in today's day and age. I accordingly

encourage interested commenters to address this issue.

The empirical basis of the "spectrum scarcity" argument has been roundly criticized by some of America's most distinguished jurists and commentators, even by former members of this Commission.[1] To be sure, the Supreme Court has not overruled its decisions that rely upon the spectrum scarcity rationale in affirming the constitutionality of FCC regulations, *see, e.g., Red Lion*, 395 U.S. 367 (1969); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), and of course it goes without saying that it is not the job of this agency to make constitutional law or to question Supreme Court precedent. But the underlying premise of those judicial decisions is that, as a factual matter, communications outlets are sparse. The empirical validity of spectrum scarcity is something quite different than the constitutional jurisprudence based thereupon.

When it comes to empirical questions relating to an administrative agency's area of expertise, courts have traditionally deferred to agency judgments on those matters. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989). The flip side of that judicial deference, however, is the agency's continuing responsibility to reexamine its judgments as time goes by and circumstances change. As the United States Court of Appeals for the D.C. Circuit has explained: "The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time." *Bechtel v. FCC*, 957 F.2d 873, (D.C. Cir. 1992) (citation omitted); *see also Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation."); *National Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F.2d 630, 638 (1975) ("The [Federal Communications] Commission retains a duty of continual supervision."), *cert. denied*, 425 U.S. 992.

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[1]*See e.g., Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) ("[P]artly the criticism of *Red Lion* rests on the growing number of broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting) (spectrum scarcity is "indefensible notion" and "[t]oday . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("[T]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."), *cert. denied*, 482 U.S. 919 (1987); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, Duke L. J. at 5 (forthcoming Spring 1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles* at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, *Foreign Investment in American Telecommunications: Free Speech* at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, CATO Policy Analysis, No. 282 at pp. 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

Not only are we duty-bound to reexamine the facts upon which we have in the past based our regulatory judgments about broadcasting, but the Supreme Court has clearly indicated that it might revisit its constitutional jurisprudence in this area if the FCC "signal[ed] . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984); *see also Telecommunications Research and Action Center*, 801 F.2d at 509 n.5 (explaining that, in *League of Women Voters*, "the [Supreme] Court . . . suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete.").[2] The D.C. Circuit recently ventured to say that the Court's "suggestion" in *League of Women Voters* "may impose an implicit obligation on the Commission to review the spectrum scarcity rationale." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (1998).

The biennial review required by 202(h) of the Communications Act provides the perfect opportunity for us to carry out this duty. Indeed, as the *Tribune* court observed upon the heels of its comment about our "implicit obligation" to reconsider spectrum scarcity, Congress in section 202(h) "directed the FCC to review all of its media ownership rules." *Id.* at 69. To my mind, the factual validity of spectrum scarcity is a critical element of the analysis required by 202(h). By its plain terms, that section mandates that we ask whether changes in competition have obviated the "public interest" need for our regulations. One of the most fundamental ways in which the broadcast landscape may have changed is that, due to increased competition, there are significantly more outlets for communication than there once were.[3]

To be sure, a great deal of our existing regulatory scheme depends upon the validity of spectrum scarcity. That, however, is no reason not to undertake a thoughtful review of the matter. If the world around us has changed to such a degree that our past assumptions no longer make sense, then we must acknowledge that truth. We cannot stick our heads in the regulatory sands, hoping that no one will notice the eroded foundation of our rules.

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[2]Also, in its most recent statement regarding spectrum scarcity, the Supreme Court noted the "scarcity of available frequencies [for the broadcast medium] *at its inception*," *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2342 (1997) (emphasis added), seeming to distinguish between past and present scarcity.

[3]In the mid to late 1980s, the Commission undertook this very inquiry. *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985) ("1985 Fairness Report); *In Re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043 (1987). The Commission concluded that "our comprehensive study of the telecommunications market in the 1985 Fairness Report has convinced us that [the spectrum scarcity] rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today." *Id.* at para. 64. These decisions have not been vacated or reversed, and they are still good administrative law. At the same time, they are now over ten years old, and the communications industry has undergone even more change in the interim. If these decisions do not already provide the basis for applying a higher level of scrutiny to broadcast regulation, as might very well be, they are at least an excellent starting point for a reassessment of the current state of the communications market.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL POWELL

Re: 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35

In the 1996 Telecommunications Act, Congress directed the FCC to review all of our ownership rules every two years and repeal or modify any regulation that is "no longer in the public interest." I support this Notice of Inquiry initiating the review. It is indeed time to take a sober and realistic look at our broadcast ownership rules in light of the current competitive communications environment.

Ownership rules have a long history in telecommunications regulation. At various times, we have justified these rules out of concern over possible competitive harms that might befall viewers and listeners (monopoly prices and restricted output). More often, however, many of the rules we propose to re-evaluate today are hinged on considerations we loosely call diversity.

In mandating that we review these ownership rules every two years, Congress appeared primarily concerned that we adjust or eliminate these rules if, as is anticipated by the Telecommunications Act, sufficient robust competition develops. We have a duty to take a hard look at our ownership rules in light of the current state of competition and to ask and answer whether in light of significant changes in competitive conditions these rules continue to have vitality. In this regard, I endorse fully Commissioner Furchtgott-Roth's clearly enumerated framework for considering these issues, as well as his call to address squarely the validity of spectrum scarcity rationales for our rules.

In all likelihood, however, the pivotal issues in this proceeding are likely to revolve around diversity. While competitive concerns are traditionally evaluated using well-established analytical standards, diversity is a much more visceral matter -- bathed in difficult subjective judgments and debated in amorphous terms. It has always been difficult to articulate clearly the government's interest in "diversity," and it has become even more difficult to do so in light of current judicial precedents. Yet we must do so, if we are to affirm any of our ownership rules based on such an interest, and we must do so with adequate rigor and clarity in order for such rules to withstand judicial scrutiny.

What do we need to know in order to complete this difficult task? At various times there have been a number of distinct expressions of diversity, which serve as a useful beginning framework for evaluation:

(1) **Diversity of ownership**: What should this mean? Merely a variety of owners, regardless of ethnicity or gender? Adequate representation among owners of minorities and women? If so, how great should that representation be to meet the public interest standard? Is diversity of ownership a legitimate government interest standing alone, or only in combination with other objectives, such as diversity of programming?

(2) **Diversity of programming**: What is the objective here? A variety of fare? Programming that is tailored to local communities? Programming that is targeted to particular minority or gender groups within a community? And, what is the relationship between ownership and programming, if any?

(3) **Diversity of outlets**: This can mean many different things as well. Do we wish to maximize the number of diverse outlet mediums (e.g., T.V., radio, newspapers, internet, etc.)?

Do we wish to promote multiple outlets of the same type, and if so for what purpose (ownership opportunity, diversity of programming and viewpoint)? How do we measure the adequate number of outlets under the public interest standard?

In the end, we will have to evaluate each of these diversity objectives alone and in combination and consider carefully whether government-imposed prophylactic ownership restrictions actually serve to advance any or all of these objectives, and if so, whether such restrictions are narrowly tailored to meet our objectives. We must be capable of explaining the link between ownership restrictions and our asserted diversity objectives. I urge commentators to provide comments with sufficient depth and sober analysis to allow us to do so.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

In the Matter of 1998 Biennial Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I welcome the opportunity to initiate this biennial review of our broadcast ownership rules. In addition to our statutory mandate to conduct such a review, I believe it is healthy to re-examine our rules periodically to ensure that they are still in the public interest.

The Commission's mandate in this proceeding is to determine whether any of our broadcast ownership rules are no longer necessary in the public interest as a result of competition. I write separately to state my belief that our twin interests of competition and diversity must be analyzed separately and subject to different standards of proof. Competition focuses on issues of market power. Market power can be constrained by competition even where there are only a handful of competitors in a market, and even though such competition does not reach all segments of society. In the cable context, for example, competition is deemed "effective" (and hence rates are not regulated) if a cable operator faces at least one competitor that passes 50% of the homes in its service area and 15% of subscribers take service from such competitor(s). In this context, those residents who may not have a competitive choice can benefit from those that do.

Diversity, in my mind, is different. Diversity promotes democratic values by ensuring that people are exposed to a range of views on issues of public concern. Unlike our interest in competition, I believe that our interest in promoting a diversity of voices and viewpoints can be satisfied only through a large number of separately-owned competitors in a market. Similarly, unlike our interest in competition, I do not believe that our interest in diversity can be satisfied if large segments of society do not have access to such diversity. When it comes to issues of self-governance, we cannot afford to become a nation of information haves and have-nots. Thus, I would ask those commenters who believe that our interest in diversity has been satisfied to adduce evidence not only that diverse sources of comparable information exist, but also that all segments of society -- rich and poor, urban and rural, minority and non-minority, apartment dwellers and single family home owners -- have legal and practical access to such diversity and are actually making use of it. For instance, it could be stipulated that the Internet provides diverse sources of information. But if a large number of people do not have access to a computer, or if those who have a computer find that accessing these sources is too cumbersome or too expensive, I would find it difficult to conclude that the Internet has rendered unnecessary our interest in promoting broadcasting diversity.

I stress that I have not prejudged the outcome of this inquiry. I thought it appropriate, however, to apprise commenters of the general standard by which I will ultimately decide whether our broadcast ownership rules are no longer necessary.